No. 20-3511

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MELANIE PELCHA,
Plaintiff-Appellant,

v.

MW BANCORP, INC.; WATCH HILL BANK,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF REHEARING

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INTRODUCTION AND STATEMENT OF INTEREST

The Equal Employment Opportunity Commission ("EEOC") is the primary agency Congress charged with administering and enforcing federal laws prohibiting workplace discrimination, including the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 *et seq*., and Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq*. Affirming summary judgment against plaintiff in this ADEA case, the panel held that plaintiff "must show that age was *the* reason why [she] w[as] terminated, not that age was one of multiple reasons." Slip op. at 3.

In requiring private-sector ADEA plaintiffs to demonstrate that age was the sole cause of an employment action, the panel misconstrued the ADEA and the Supreme Court's decision in *Gross v. FBL Financial Services, Inc*., 557 U.S. 167 (2009). The sole-cause standard the panel announced conflicts with, *inter alia*, *Gross*; *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Burrage v. United States*, 571 U.S. 204 (2014); *Laugesen v. Anaconda Co*., 510 F.2d 307 (6th Cir. 1975); *Lewis v. Humboldt Acquisition Corp*., 681 F.3d 312 (6th Cir. 2012) (en banc); and precedent from other courts of appeals. As such, panel rehearing or rehearing en banc is appropriate. *See* Fed. R. App. P. 35(a), 35(b)(1), 40(a)(2). Because the EEOC has a strong interest in the proper interpretation of the ADEA and other anti-discrimination statutes using

materially identical causation language, it offers its views to the Court. *See* Fed. R. App. P. 29(b)(2).[1]

ARGUMENT

A private-sector employer violates the ADEA if it discharges or "otherwise discriminate[s] against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added). In *Gross*, the Supreme Court held that the ADEA's use of "because of" imposes a "but-for" standard of causation. *Gross*, 557 U.S. at 176. Applying this standard, however, the panel opinion here went further by requiring that age be not merely a *determinative* cause of the employment action but its *sole* cause. Slip op. at 3. This conflation of but-for and sole causation conflicts with *Gross* and numerous other decisions from the Supreme Court, this Court, and other circuits, including decisions interpreting *Gross*.[2] Rehearing is therefore warranted.

A. Under *Gross*, Courts Must Apply A But-For Causation Standard — Not A Sole-Causation Standard — To Private-Sector ADEA Claims.

In *Gross*, the parties disputed whether a plaintiff may establish causation in an ADEA case by showing that age was a mere "motivating factor" in an employment

[1] The EEOC takes no position on any other issue presented in this appeal, including whether plaintiff produced sufficient evidence to avoid summary judgment on the causation issue.

[2] We note that the panel did not have the benefit of full briefing on all relevant authorities at the panel stage.

decision — i.e., by demonstrating that an employer took age into account, even if age did not have a determinative effect. *Gross*, 557 U.S. at 173-74. The Supreme Court rejected that standard, instead reaffirming its conclusion in *Hazen Paper* that an ADEA plaintiff must show that age "actually played a role in [the employer's decisionmaking] process *and had a determinative influence on the outcome*." *Gross*, 557 U.S. at 176 (alteration in original) (quoting *Hazen Paper*, 507 U.S. at 610); *see also Hazen Paper*, 507 U.S. at 617 (holding that a plaintiff seeking to show that an employer willfully violated the ADEA need not "prove that age was the predominant, rather than a determinative, factor in the employment decision"). It was in this context that *Gross* concluded, "To establish a disparate-treatment claim under the plain language of the ADEA, . . . a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Id.* (explaining that "because of" indicates "a but-for causal relationship and thus a necessary logical condition" (citation omitted)).

The term "but-for cause" has a well-established legal meaning derived from "textbook tort law." *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020) (citation omitted) (explaining meaning of but-for causation in case interpreting 42 U.S.C. § 1981). Under the "ancient and simple 'but for' common law causation test," a plaintiff "must demonstrate that, but for the defendant's unlawful conduct, its alleged injury would not have occurred." *Id.*; *see also, e.g.*, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346-47, 360 (2013) (defining but-for cause in interpreting Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a)). Indeed, in

Gross's discussion of the but-for causation standard, the Court cited a torts treatise for this very test. *Gross*, 557 U.S. at 176-77 (citing W. Keeton et al., *Prosser and Keeton on Law of Torts* 265 (5th ed. 1984)).

It follows from that definition that an act qualifies as a "but-for" cause of harm — even in the presence of other causes — so long as it can be characterized as "the straw that broke the camel's back." *Burrage*, 571 U.S. at 211 (interpreting criminal statute adopting but-for standard and drawing on authority applying that standard in other contexts, including *Gross*). "Thus, if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived." *Id.*; *see id.* at 211-12 (noting an event is a but-for cause if the result would not have occurred in its absence, even if "a host of *other* necessary causes" are present).[3] Similarly, here, if the evidence showed that plaintiff's alleged infraction would not have led to termination if she had been younger, but that the combination of her age and the infraction caused defendant to fire her, she would establish that age

[3] Tort law recognizes that the but-for standard must be supplemented in the rare case of multiple "independently sufficient factual causes," in which each is sufficient, on its own, to cause the harm at issue. *Nassar*, 570 U.S. at 347; *see also, e.g.*, *Burrage*, 571 U.S. at 214, 218 (giving example of one actor fatally stabbing a victim at the same time another actor fatally shoots him, and noting both would be liable). In such circumstances, none of the independent causes would satisfy strict application of the but-for causation test, yet courts typically deem causation to be established. This case does not appear to present such an issue.

was a but-for cause of her termination — even if her employer would have retained her absent the infraction.

By adopting a but-for causation standard for ADEA cases, *Gross* therefore rejected the sole-causation standard the panel applied. *Accord* Dan B. Dobbs et al., *The Law of Torts* § 186 (2d ed. 2020) ("It is by no means true that the but-for test reduces everything to a single cause."). *Burrage*, which discussed *Gross* in articulating the but-for causation standard described above, expressly confirmed this understanding of *Gross*. *Id.* at 212-13. Indeed, when quoting *Gross*, *Burrage* replaced the phrase "*the* 'but for' cause" with the phrase "[*a*] 'but for' cause," emphasizing that age could be one of multiple causes of a challenged employment action. *Id.* (alteration in original) (emphasis added) (quoting *Gross*, 557 U.S. at 176); *see also, e.g.*, *United States v. Miller*, 767 F.3d 585, 591-92 (6th Cir. 2014) (in criminal case, invoking *Burrage*'s reference to "the straw that broke the camel's back" in describing the but-for causation inquiry under *Gross* and related decisions (citation omitted)).

This Court's longstanding precedent also accords with an understanding that the ADEA requires but-for — not sole — causation. In an early case applying the ADEA, this Court explained that "even if more than one factor affected the decision to discharge [the plaintiff], he could nevertheless recover if one factor was his age and it in fact made a difference." *Laugesen*, 510 F.2d at 310, 316-17; *see also, e.g.*, *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1333 (6th Cir. 1994) (upholding jury instruction that "focuses the jury's attention on the need for age discrimination to have been 'a'

— not 'the' — determining factor" underlying an adverse action); *cf. Goostree v. Tennessee*, 796 F.2d 854, 863 (6th Cir. 1986) (distinguishing sole-motivation standard from "but for" standard). *Gross*, which confirmed the application of these principles, did nothing to alter them.[4]

More recently, this Court sitting en banc confirmed this understanding of but-for causation (both generally and specifically under the ADEA) when it addressed causal requirements under the Americans with Disabilities Act of 1990 ("ADA"), which, at the relevant time, prohibited discrimination "because of" disability, 42 U.S.C. § 12112(a) (2007). *Lewis*, 681 F.3d at 315-16, 321. This Court held, "A law establishing liability against employers who discriminate 'because of' an employee's disability does not require the employee to show that the disability was the 'sole' cause of the adverse employment action." *Id.* at 315-16 (distinguishing statutes expressly including a sole-cause standard). Instead, emphasizing the similarity in the ADEA's and ADA's causation language, and relying heavily on *Gross*, this Court concluded, "The ADEA and the ADA bar discrimination 'because of' an employee's age or disability, meaning that they prohibit discrimination that is a '"but-for" cause of the

[4] Some decisions of this Court preceding *Gross* concluded that at least some ADEA plaintiffs may establish causation by showing that age was a "motivating factor" in an employment action, at which point the burden shifts to the defendant to prove that age was not a but-for cause of the action. *See, e.g.*, *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570, 571, 574 (6th Cir. 2003) (en banc). *Gross* expressly rejected that approach, 557 U.S. at 178-80, thus overruling contrary precedent, *Geiger v. Tower Auto.*, 579 F.3d 614, 621 & n.2 (6th Cir. 2009).

employer's adverse decision."' *Id.* at 321 (quoting *Gross*, 557 U.S. at 176). "The same standard applies to both laws." *Id.*

Numerous decisions from other courts of appeals, many of which post-date *Gross*, have similarly concluded that ADEA plaintiffs need only show that age was a but-for cause of the challenged employment action rather than its sole cause. *See, e.g.*, *Carson v. Lake Cnty.*, 865 F.3d 526, 533 (7th Cir. 2017); *Jones v. Okla. City Pub. Schs.*, 617 F.3d 1273, 1277-78 (10th Cir. 2010); *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1334-35 (11th Cir. 1999); *Robinson v. City of Phila.*, 491 F. App'x 295, 299 (3d Cir. 2012); *see also Leal v. McHugh*, 731 F.3d 405, 414-15 (5th Cir. 2013) (reaching this conclusion under *Gross* after assuming *Gross*'s standard applied to ADEA claims against a federal employer). In addition, other courts of appeals — and this Court in an unpublished decision — have similarly distinguished but-for causation from sole causation when interpreting Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), which uses similar "because" language and incorporates a but-for causation standard, *Nassar*, 570 U.S. at 346, 352, 360 (relying in part on *Gross* for that standard). *See, e.g.*, *Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 846 & n.5 (2d Cir. 2013); *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 218 (4th Cir. 2016); *Laughlin v. City of Cleveland*, 633 F. App'x 312, 316 (6th Cir. 2015). We are aware of no contrary published precedent from other courts of appeals.

B. The Panel's Reasoning Does Not Support A Contrary Result.

The precedents the panel cited for its conclusion that the ADEA incorporates a sole-cause standard, slip op. at 3, do not support that result. *Scheick v. Tecumseh Public Schools*, 766 F.3d 523 (6th Cir. 2014), contains no language requiring sole causation. Instead, it simply quoted *Gross* and *Nassar* for the proposition that an ADEA plaintiff must prove "that age was the 'but-for' cause of the challenged employer decision" and thus "the reason that the employer decided to act." *Id.* at 529 (citations omitted). To the extent that the panel relied on *Scheick*'s — and *Gross*'s — use of "the" rather than "a" before "but-for cause" and "reason," that word cannot bear so much interpretive weight. As explained above, consistent with the well-established meaning of "but-for cause," the Supreme Court and courts of appeals have interpreted *Gross* to reject a sole-cause standard. *See also Burrage*, 571 U.S. at 213 (replacing "the" with "a" in describing *Gross*'s holding: "a plaintiff must prove that age was [a] 'but for' cause of the employer's adverse decision" (alteration in original) (quoting *Gross*, 557 U.S. at 176)); *Lewis*, 681 F.3d at 321 (similar).

The panel noted that *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), recently addressed whether Title VII's language prohibiting workplace discrimination "because of" sex, 42 U.S.C. § 2000e-2(a)(1), requires plaintiffs to show that sex was the sole cause of an employment action. Slip op. at 3. *Bostock* observed that Title VII's "'because of' test incorporates the simple and traditional standard of but-for

causation." 140 S. Ct. at 1738-40 (citation omitted) (clarifying that "nothing in our analysis depends on the motivating factor test" set forth in a different provision of Title VII, 42 U.S.C. § 2000e-2(m)). Under that "traditional" standard, the Court explained, "a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision," so long as the protected characteristic "was one but-for cause of that decision." *Id.* at 1739 (noting that "[o]ften, events have multiple but-for causes"). *Accord McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 & n.10 (1976) (holding that Title VII's "because of" language requires a showing of but-for — not sole — causation). In concluding that but-for causation exists "whenever a particular outcome would not have happened 'but for' the purported cause," even if other factors, including other but-for factors, might also be present, *Bostock* positively cited *Gross* — and drew on the same "traditional" tort-law principles *Gross* invoked. 140 S. Ct. at 1739 (citing *Gross*, 557 U.S. at 176).

According to the panel, *Bostock* expressly limited its holding regarding but-for and sole causation to the Title VII context. Slip op. at 3. This Court need not decide the breadth of *Bostock*'s reach, however. As explained above, the conclusion that the ADEA requires a showing of but-for causation, not sole causation, is amply supported by numerous other decisions of the Supreme Court, this Court, and other courts of appeals, including *Gross*, *Hazen Paper*, *Burrage*, and *Lewis*. *See supra* pp. 2-7.

This Court thus need not address whether *Bostock* provides additional support for that conclusion.

The panel also held that, even if *Bostock* applied beyond the Title VII context, it was bound to follow *Gross*, which the panel characterized as contrary to *Bostock*. Slip op. at 3-4. As explained above, however, the panel conflated *Gross*'s establishment of a but-for causation standard with a sole-causation standard. *Gross* and *Bostock* thus are entirely consistent; each adopted a but-for causation standard, not a sole-causation standard.

Moreover, as this Court explained in *EMW Women's Surgical Center, P.S.C. v. Friedlander*, 978 F.3d 418 (6th Cir. 2020), on which the panel relied, lower courts are bound to apply the Supreme Court's interpretation of its precedents, "regardless of whether [they] would adopt that interpretation as a matter of first impression." *Id.* at 436. Because the Supreme Court has interpreted *Gross* to reject a sole-causation standard, *see Burrage*, 571 U.S. at 213, this Court must give that interpretation controlling weight.

CONCLUSION

For the foregoing reasons, this Court should rehear the case.

Respectfully submitted,

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February 10, 2021

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(b)(4) because it contains 2,543 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) and (c)(2) because it was prepared using Microsoft Word for Office 365 ProPlus in Garamond 14-point font, a proportionally spaced typeface.

/s/ Jeremy D. Horowitz
JEREMY D. HOROWITZ

CERTIFICATE OF SERVICE

On February 10, 2021, I filed the foregoing brief with the Clerk of the Court by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Jeremy D. Horowitz
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ADDENDUM

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29 U.S.C. § 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

. . . .

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ;

. . . .

42 U.S.C. § 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

. . . .

42 U.S.C. § 12112 (2007). Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

. . . .